The Commonwealth of Massachusetts

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

February 25, 2005

D.T.E. 04-76

Petition of Aquaria LLC, a seller in bulk of desalinated water, for a determination regarding the applicability of G.L. c. 164 and G.L. c. 165, including its status as a water company and its obligations regarding any consolidation, sale, merger, financing, and annual reporting.

APPEARANCES: Andrew H. Cohn, Esq.
John Delaney, Esq.
Mark C. Kalpin, Esq.
Wilmer Cutler Pickering Hale and Dorr LLP
60 State Street
Boston, Massachusetts 02109

FOR: AQUARIA LLC
Petitioner

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I. INTRODUCTION AND PROCEDURAL HISTORY

On July 28, 2004, Aquaria LLC, d/b/a Aquaria Water LLC, ("Aquaria" or "Company") filed with the Department of Telecommunications and Energy ("Department") a petition for a determination[1] regarding the applicability of G.L. c. 164 and G.L. c. 165, including its status as a water company and its obligations regarding any consolidation, sale, merger, financing, and annual reporting (Exh. AQ-2, at 1). Aquaria is a Delaware limited liability company that intends to construct, finance, own, and operate a water desalination facility ("Desalination Plant") in the Town of Dighton, as well as related pipes and mains and other accessory facilities to convey the desalinated water to cities and towns on a wholesale contract basis (id.). The Company anticipates issuing approximately $32 million to $36 million in term notes, the proceeds of which will be applied to the construction of the Desalination Plant (Exhs. AQ-1, exhs. C, D; DTE 2-5). The Department docketed this matter as D.T.E. 04-76.

The Department conducted public and evidentiary hearings, followed immediately thereafter by oral argument, on Aquaria's petition at the Department's offices on September 29, 2004. At the evidentiary hearing, the Company sponsored the testimony of

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[1] The Company did not seek an advisory ruling pursuant to G.L. c. 30A, § 8 and 220 C.M.R. § 2.08. See, e.g., Massachusetts-American Water Company, Advisory Ruling, D.P.U. 95-41, at 7 (1995); Dartmouth Power Associates Limited, Advisory Ruling, D.P.U. 90-142, at 13-14 (1990). In an advisory ruling, we assume, without finding, that the assertion of material facts is both complete and accurate. USGen New England, Advisory Ruling, D.T.E. 98-20, at 2, n.3 (1998). In the present proceeding, however, we have held an evidentiary hearing, and rely upon sworn testimony and exhibits, and are thus positioned to make findings of fact and conclusions of law.

Juan Pablo Diaz Batanero, general manager of Aquaria, and John Condon, chief financial officer of the City of Brockton. Aquaria submitted a brief on October 15, 2004. In addition, Department staff conducted a route and site visit of the Company's proposed facilities on September 24, 2004. The evidentiary record includes 28 exhibits.

II. DESCRIPTION OF COMPANY'S PROPOSAL

A. Designation as a Water Company

Aquaria requests that the Department make a finding that Aquaria constitutes a water company within the meaning of G.L. c. 165, §§ 1 through 11E, the statutes that define the rules and regulations under which water companies operate (Exh. AQ-2, at 1). The Company states that it is a limited liability company organized under the Limited Liability Company Act, St. 1995, c. 281, § 18, codified at G.L. c. 156C. Enacted in 1995, G.L. c. 156C codifies the powers and privileges of limited liability companies, and as such it is an "association" as that term is used in G.L. c. 165, § 1,[2] which defines the entities that may be water companies within the Commonwealth (Exh. AQ-2, at 7; Tr. at 59; Company Brief at 7). The Company intends to be "engaged in the distribution and sale of water in the Commonwealth through pipes or mains," and maintains that its business activities satisfy the requirements of G.L. c. 165, § 1 (Exhs. AQ-2, at 1; DTE 1-1; Tr. at 59; Company Brief at 7-8).

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[2] General Laws c. 165, § 1 states that a corporation or company is "every person, partnership, association or corporation, other than a municipal corporation, and other than a landlord supplying his tenant, engaged in the distribution and sale of water in the commonwealth through its pipes or mains."

Aquaria states that it and the City of Brockton ("Brockton") executed a Water Sales Agreement ("WSA") by which it will sell and convey desalinated water to Brockton.[3] The terms of the WSA require Aquaria to be designated a water company by the Department pursuant to G.L. c. 165, § 1 (Company Brief at 8). This would allow Brockton to meet the exemption provided by G.L. c. 30B, § 7 that, in relevant part, permits municipalities to procure water service without competitive bidding, upon certification that the vendor constitutes a "sole source" provider, such as a regulated utility pursuant to by G.L. c. 25, § 3 (Exh. DTE 1-2; Tr. at 22-23).

In addition to G.L. c. 165, water companies are subject to selected provisions of Massachusetts general laws pertaining to gas, electric, and municipal lighting systems. G.L. c. 165, § 2. These statutes include provisions relating to corporate governance, securities issuances, and rates.[4] Although Aquaria seeks a finding that it is a water company subject to the Department's jurisdiction, it also seeks a determination that it is, as a matter of law, not subject to certain statutory provisions that would otherwise be applicable to it. We shall now describe Aquaria's position on the statutory provisions that it claims are inapplicable.

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[3] Aquaria stated that a number of other communities have expressed interest in the project and entering into some form of contractual arrangement (Tr. at 90). The Company and the Town of Norton have reached a preliminary agreement regarding the sale and conveyance of desalinated water (id.).

[4] The specific statutes found in G.L. c. 164 that cross-apply to water companies include G.L. c. 164, §§ 4 through 8D, 10 through 14, 16 through 19, 21 through 25, 33, 78 through 84, 92, 93, 94, 96, 98, 99, 101, 102A, 102B, and 128.

B. Applicability of G.L. c. 164, §§ 4-8D, 10-14, 16-19, 21, 23-24, and 33

Aquaria requests that the Department find that the requirements of G.L. c. 164, §§ 4 through 8D, 10 through 14, 16 through 19, 21, 23 through 24 and 33, which pertain to utility capitalization, debentures, and securities issuance, are not applicable to it (Exhs. AQ-2, at 3; DTE 1-4; DTE 1-5).[5] The Company contends that these sections apply only to corporations and not to limited liability companies such as Aquaria (Exh. AQ-2, at 4; Company Brief at 8-9). The Company maintains that because its governance requirements are found in G.L. c. 156C, simultaneous application of G.L. c. 164 would be inapplicable and unworkable for Aquaria's business structure (Exh. AQ-2, at 3; Company Brief at 8-9). In support of its position, the Company relies on Dartmouth Power Associates Limited, Advisory Ruling, D.P.U. 90-142 (1990).[6] The Company also relies on other Department decisions and rulings from the Attorney General that found unincorporated associations were exempt from the requirements of these statutes (Company Brief at 10, citing MASSPOWER, D.P.U. 92-152 (1993); New England Gas and Coke Company, 1 Op. Att'y Gen. at 8-15 (1899)).

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[5] Aquaria withdrew its request for findings concerning the application of G.L. c. 164, § 22, governing the deposit of funds by corporations subject to G.L. c. 164, and G.L. c. 164, § 25, prohibiting the use by any person owning, holding or controlling shares of stock in a public service company from using the name or title or other words that the Department considers might lead the public to believe that such person, or business of that person, is a public service corporation (Exh. DTE 1-5(m), (o)).

[6] In D.P.U. 90-142, at 13-14, the Department ruled, based on the factual scenario represented by the petitioner, but not adjudicated to factual findings by the Department, that limited liability companies were exempt from a number of statutes contained in G.L. c. 164. See note 1 above.

Aquaria further argues that the provisions from which it seeks findings of inapplicability are intended only to assist the Department's rate regulation of companies (Exh. AQ-2, at 3-4). The Company maintains that these statutes are not applicable to Aquaria because it is engaged solely in the bulk sale of desalinated water to cities and towns under the terms of negotiated contracts and is not subject to our rate regulation. The Company analogizes to prior Department Orders where we have found that companies engaged in the wholesale electric generation business are subject to minimal oversight and regulation, and not subject to G.L. c. 164, §§ 4 through 8D, 10 through 14, 16 through 19, 21, 23 through 25 and 33 (Company Brief at 11-12, citing USGen New England, Advisory Ruling, D.T.E. 98-20; Millennium Power Partners, Advisory Ruling, D.T.E. 98-19 (1998); D.P.U. 90-142, at 7-8, 13-15). The Company argues that, so long as its business is limited to the production and supply of desalinated and purified water in bulk to cities and towns in the Commonwealth, Aquaria should be afforded a "Wholesale Business Condition" exemption from these statutes (Exh. AQ-2, at 2).

Aquaria makes an additional argument with respect to the financing requirements of G.L. c. 164, § 14. The Company contends that because it is a wholesale, bulk producer of water selling under the terms of contracts, any securities which Aquaria issues would be unrelated to the rates it can charge under its negotiated contracts (Exh. AQ-2, at 4). Therefore, Aquaria concludes that it should not be subject to the requirements of G.L. c. 164, § 14 (Exhs. AQ-1, at 6; AQ-2, at 4). In the alternative, Aquaria proposes that the Department

approve the Company's initial financing, but not require approval of subsequent borrowings made by Aquaria (Exh. AQ-2, at 4; Tr. at 78-79, 81-82).

C. Applicability of G.L. c. 164, §§ 81-84

Aquaria requests modification of the applicability of the various recordkeeping and reporting requirements of G.L. c. 164, §§ 81 through 84 (Exh. AQ-1, at 6),[7] such as the Department's Uniform System of Accounts for Water Companies ("USOA-Water"), 220 C.M.R. §§ 52.00 et seq. (Exhs. AQ-1, at 6; DTE 1-10). First, the Company proposes that it be permitted to satisfy the accounting requirements of G.L. c. 164, § 81 by providing information on an annual basis prepared in accordance with generally accepted accounting principles ("GAAP") in lieu of those required by the USOA-Water (Exh. DTE 1-8; Tr. at 67-68).

Second, the Company proposes modification of G.L. c. 164, § 82, which requires that water companies keep records pertaining to their production of water in such form as the Department may require (Exh. DTE 1-8). Aquaria argues information and records compiled and maintained in compliance with the permit requirements of other governmental agencies, including the United States Environmental Protection Agency ("USEPA") and the Massachusetts Department of Environmental Protection ("DEP"), are sufficient to satisfy the requirements of G.L. c. 164, § 82 (Exh. DTE 1-8).

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[7] Aquaria withdrew its request for a finding that G.L. c. 164, § 80, concerning the maintenance by a water company of an office in a community where its works are located, was inapplicable to the Company (Exh. DTE 1-7).

Third, Aquaria proposes to submit its audited financial statements with the Department on an informational basis for purposes of complying with G.L. c. 164, § 83, which requires the submission of an annual return (Exh. DTE 1-10). In addition, Aquaria requests that the Department clarify that the information the Company will provide in its proposed informational filings will not constitute a basis for asserting jurisdiction over, or regulating, Aquaria's water rates (Exh. AQ-1, at 6). Aquaria concludes that a reading of G.L. c. 164, § 1A(e), governing wholesale electric companies, makes it clear that the requirements of G.L. c. 164, § 81-84 would not apply to Aquaria (Company Brief at 13-14).

D. Applicability of G.L. c. 164, §§ 92 and 128

The Company requests a finding of inapplicability of the denial of service provisions of G.L. c. 164, § 92, as well as the security deposit requirements of G.L. c. 164, § 128 (Exh. AQ-1, at 6). The Company argues that G.L. c. 164, § 92 pertains to retail customers seeking service from a utility company, and thus would be inapplicable to Aquaria as long as the Company continues to meet its Wholesale Business Condition (Exhs. AQ-2, at 4; DTE 1-6). Aquaria also argues that G.L. c. 164, § 128 specifies that end-use customers of a corporate utility company are the beneficiaries of the security deposit requirement, and Section 128 thus inapplicable to the Company so long as it continues to meet its Wholesale Business Condition (Exhs. AQ-2, at 5; DTE 1-8).

E. Applicability of G.L. c. 164, § 94

The Company requests a finding of inapplicability of the rate and contract filing and approval requirements of G.L. c. 164, § 94. The Company contends that, although it

constitutes a water company, it would not be serving retail customers, but rather have bulk service contracts with municipalities (for example, Brockton and Norton) (Exh. AQ-1, at 2).[8] Thus, Aquaria argues that it is reasonable to conclude that requirements typically imposed on water companies selling at retail and operating on a cost of service basis will not be relevant to Aquaria or its bulk water contracts (Exhs. AQ-1, at 4; AQ-2, at 6).[9]

F. Applicability of G.L. c. 164, §§ 96, 99, 101, 102A, and 102B

The Company requests a finding of inapplicability of the various merger- and acquisition-related provisions of G.L. c. 164, §§ 96, 99, 101, 102A, and 102B (Exh. AQ-1, at 6). Aquaria reasons that these statutes would require the Department's approval of any sale, merger or consolidation with another water company (Exh. AQ-2, at 3). According to Aquaria, G.L. c. 164, § 96 exempts wholesale generation companies from these requirements, and thus, Aquaria states, by analogy, that the Company should be exempted from these statutes (Company Brief at 13). The Company proposes that, provided Aquaria continue to provide

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8 Under the terms of the WSA, the delivery point will be designated by Brockton at either (1) a point on Brockton's distribution mains at Pearl Street and West Elm Street Extension, or (2) a point within one-quarter mile of the Pearl Street and West Elm Street Extension location, if construction of a water storage tank is required (WSA, at 14). Brockton will "blend" its supplies from Aquaria with those of its own for sale to end-use customers (Exh. AQ-3, at 3). Therefore, end-use customers in Brockton, including municipal buildings, will remain end-use customers of the Brockton Water Board.

9 In its initial filing, Aquaria requested a finding of nonapplicability of the Department's optional cost of equity formula provided in 220 C.M.R. §§ 31.00 et seq. and used in the G.L. c. 164, § 94 ratemaking process (Exh. AQ-1, at 6). The Company subsequently withdrew this request (Exh. DTE 1-9).

desalinated water wholesale to cities and towns, Department approval not be required of any merger or consolidation with another water company (Exh. AQ-2, at 3).

The Company also requests a finding that project lenders would not become considered a water company under G.L. c. 165, § 1, or would be subject to minimal regulation sought herein for Aquaria, if the project lenders exercise standard mortgagee rights that are included in the terms of the loan, such as taking possession of the property or selling the project at a foreclosure sale if Aquaria defaults on its obligations (Exh. AQ-1, at 6; Company Brief at 14). According to the Company, such an assurance to the project lenders is reasonable and consistent with Department precedent (Company Brief at 14-15, citing D.P.U. 90-142, at 13-14).

III. ANALYSIS AND FINDINGS

A. Designation as a Water Company

General Laws c. 165, § 1 defines a water company[10] as "every person, partnership, association or corporation, other than a municipal corporation, and other than a landlord supplying his tenant, engaged in the distribution and sale of water in the Commonwealth through its pipes or mains."[11] Thus, G.L. c. 165, § 1 establishes a two-part test to determine

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[10] In contrast to the statutes governing water companies, G.L. c. 164, §§ 1 and 2 distinguishes gas and electric companies by whether these companies are incorporated or unincorporated entities.

[11] A review of Department records, including our Orders, demonstrates that water systems under our jurisdiction have included, and currently include, a range of corporate structures. See, e.g., Pinehills Water Company, D.T.E. 01-42, at 1 (2001) (corporation); McNamara Water Works, D.P.U. 91-196, at 15 (1992) (proprietorship);

(continued…)

whether a water system is subject to the jurisdiction of the Department. First, the entity must be organized under one of the specified business forms. Second, the entity must be engaged in both the distribution of and sale of water through its pipes and mains in the Commonwealth. Pond Meadow Water Trust, Advisory Ruling, D.P.U. 80-1, at 5-6 (1980). If a water system meets the requirements of G.L. c. 165, § 1, it is subject to Department jurisdiction as provided in G.L. c. 165.

Aquaria is registered as a Delaware limited liability company conducting business in the Commonwealth in accordance with the provisions of G.L. c. 156C (Exh. DTE 1-4; Tr. at 54). A limited liability company has members rather than shareholders. G.L. c. 156C, § 2. The Company's members consist of Bluestone and Inima USA (Tr. at 55). Therefore, Aquaria constitutes an "association" for the purpose of G.L. c. 165, § 1.[12]

The Company intends to construct a desalination plant with an initial capacity of five million gallons per day ("MGD") and an ultimate capacity of ten MGD (Exh. AQ-1, at 1). The Company will sell the output to municipalities as a supplemental supply under the terms of bulk wholesale contracts, delivering the water through a 20-inch transmission main running 14 miles from Dighton to Brockton that will be owned and operated by Aquaria (Exhs. AQ-1, at 1-2, exh. B; AQ-5; AQ-6; AQ-7, at 3). Therefore, Aquaria is engaged in the distribution

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[11](…continued)
1928 Annual Report to General Court, at 15-16 (1929). In contrast, the last Department-regulated, unincorporated gas or electric distribution company was Maspenock Electric Light Company, a partnership that ceased operations in 1941. Maspenock Electric Light Company, D.P.U. 4695 (1941).

[12] See note 1 for the definition of a water company pursuant to G.L. c. 165, § 1.

and sale of water in the Commonwealth through its pipes or mains. Cf. Pond Meadow Water Trust, Advisory Ruling D.P.U. 80-1, at 5-6 (trust operating water system for benefit of trust members engaged in distribution, but not sale, of water).

Aquaria has established both of the elements established in G.L. c. 165, § 1, i.e., it is (1) an association, and (2) engaged in the distribution and the sale of water. Accordingly, the Department concludes that Aquaria constitutes a water company within the meaning of G.L. c. 165, § 1 and thus is subject to the jurisdiction of the Department.[13]

B. Application of G.L. c. 164 to Aquaria

1. Introduction

Aquaria seeks a ruling that certain provisions of G.L. c. 164 be found inapplicable to the Company. The Company contends that because it is not engaged in the "distribution" of water as that term is defined in G.L. c. 164, § 1,[14] G.L. c. 164 provides an independent basis for exempting Aquaria from various provisions of that chapter (Company Brief at 11). Massachusetts law, however, provides a definition of water companies that does not require analogy to the definition of gas and electric companies found in G.L. c. 164, § 1. G.L. c. 165, § 1.[15] In light of the clear definition of water companies provided by

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[13] Our findings here also establish that Aquaria is a regulated utility as defined by G.L. c. 25, § 3, thus enabling the Company to satisfy the requirements of the WSA.

[14] General Laws c. 164, § 1 defines "distribution" as delivery of electricity over lines operating at a voltage level typically equal to or greater than 110 volts and less than 69,000 volts to an end-use customer within Massachusetts.

[15] General Laws c. 165, § 2 does not incorporate by reference the definition of gas and (continued…)

G.L. c. 165, § 1, an attempt to graft the provisions of G.L. c. 164, §§ 1 and 2 onto this definition is unnecessary and would produce contradictory and confusing results. Nonetheless, we recognize that parallel practices in the gas and electric industries may be instructive in establishing whether analogous conclusions can be drawn for the water industry. Therefore, while the Department will not rely on G.L. c. 164, §§ 1 or 2 to determine the applicability of various sections of G.L. c. 164 to the Company, the Department acknowledges gas and electric practices in determining the application of particular statutes to Aquaria.

Aquaria also relies on D.P.U. 90-142 to support its contention that it should not be subject to various statutes contained in G.L. c. 164. In 1995, however, the Legislature enacted G.L. c. 156C. Unlike the situation faced by the Department in 1990 when we issued D.P.U. 90-142, there is now a body of law that specifically addresses limited liability companies. The Department concludes that D.P.U. 90-142 provides useful precedent in distinguishing companies engaged solely in wholesale operations from retail utilities, but the Company's request must be evaluated in light of G.L. c. 156C, c. 164, and c. 165 as well.

2. G.L. c. 164, §§ 4-6, 8-8D, 23-24, and 33

General Laws c. 164, §§ 4 through 6, 8 through 8D, 23 through 24, and 33 pertain to various corporate governance matters, as well as certain obligations of the Secretary of the Commonwealth. G.L. c. 164, § 4, incorporates by reference certain provisions of the general corporation statutes from G.L. c. 156B. Aquaria is organized under G.L. c. 156C, a separate

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[15](…continued)
electric companies found in G.L. c. 164, §§ 1 and 2.

chapter specifically governing limited liability companies (Exh. DTE 1-4) and the corporate governance requirements of G.L. c. 156B are applicable to the Company. Therefore, the provisions of G.L. c. 164, § 4 do not apply to Aquaria.

General Laws c. 164, §§ 5, 6, 8 through 8D, 23, and 24, are corporate governance and shareholder voting provisions. These statutory provisions regarding corporations have equivalents for limited liability companies in G.L. c. 156C, including G.L. c. 156C, §§ 47 and 48. Therefore, because these sections of G.L. c. 164 have their parallels in G.L. c. 156C, they are not applicable and the requirements of G.L. c. 156C govern Aquaria.

General Laws c. 164, § 5A governs the use of business names by a corporation, and requires in relevant part that the words "water company" be included in the business name of a corporation engaged in the distribution and sale of water. The corporate name requirements for limited liability companies are found in G.L. c. 156C, § 7, which does not require the use of the phrase "water company" in the name of a limited liability company operating as a water company. An association may be a water company for certain, discrete, regulatory purposes without compelling the conclusion that the nomenclature requirement of G.L. c. 164, § 5A is automatically applicable. Aquaria, however, has adopted a d/b/a name of Aquaria Water LLC (Exh. AQ-1, at 1). Therefore, the Company's selection of a d/b/a renders rather academic any issues concerning G.L. c. 164, § 5A. See NIPSCO/Bay State Acquisition, D.T.E. 98-31, at 61 (1998).[16]

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[16] The Department is unaware of any statutory prohibition against Aquaria changing its business name to "Aquaria Water LLC."

General Laws c. 164, §§ 4A and 33 pertain to the Secretary of the Commonwealth's document processing and filing fees for corporations. The requirements of these statutes are paralleled in both G.L. c. 156C, § 17 and the Secretary of the Commonwealth's own regulations. Therefore, the Department concludes that the underlying obligations found in G.L. c. 164, §§ 4A and 33 are more appropriately established in the case of a limited liability company through the Secretary of the Commonwealth's own regulations applicable to business entities organized under G.L. c. 156C.

Accordingly, the Department concludes that G.L. c. 164, §§ 4, 5 through 8D, and 23 through 24 are not applicable to the Company and that the request regarding the requirements of G.L. c. 164, § 5A is moot. Furthermore, we conclude that the obligations of G.L. c. 164, §§ 4A and 33 are more appropriately established through the Secretary of the Commonwealth's own regulations applicable to business entities organized under G.L. c. 156C.

3. G.L. c. 164, §§ 10-13, and 18-19 [17]

General Laws c. 164, §§ 10 through 13, and 18 through 19, involve the issuance of common stock by utility companies. Because Aquaria is a limited liability corporation, with members instead of shareholders, it does not issue common stock (Exh. DTE 1-3(a)). Therefore, the Department concludes that statutory provisions governing the issuance of capital stock contained in G.L. c. 164, §§ 10 through 13 and §§ 18 through 19, do not apply to Aquaria.

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[17] As noted above, the Company withdrew its request for a ruling of non-applicability of G.L. c. 164, § 25 (Exh. DTE 1-5(o)).

4. G.L. c. 164, §§ 14, 16, and 17

General Laws c. 164, §§ 14, 16, and 17 pertain to the issuance of securities by water companies. In this context, the term "securities" includes stock, bonds, coupon notes and other evidences of indebtedness payable at periods of more than one year from issuance. G.L. c. 164, § 14. Although Aquaria contends that these statutes do not apply to limited liability companies, the statutes reference "company" and "companies." Limited liability companies constitute a company for purposes of G.L. c. 165, § 1. The use of the specific term "company" and "companies," versus the narrower "corporation," extends the application of this specific statute to a range of business organizations, including limited liability companies.

Specifically, the Company's interpretation of G.L. c. 164, § 14 ignores the overall intent of the statute. The Department's standard of review for financing petitions consists of a two-pronged test. First, the Department must assess whether the proposed issuance is reasonably necessary to accomplish some legitimate purpose in meeting a company's service obligations, pursuant to G.L. c. 164, § 14. Fitchburg Gas & Electric Light Company v. Department of Public Utilities, 395 Mass. 836, 842 (1985), citing Fitchburg Gas & Electric Light Company v. Department of Public Utilities, 394 Mass. 671, 678 (1985). Second, the Department must determine whether the Company has met the net plant test.[18] Colonial Gas Company, D.P.U. 84-96 (1984).

Under this two-pronged standard of review, the effect of a proposed financing, stock issuance or debt issuance is assessed not only from the standpoint of the ratepayer, but also

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[18] The net plant test is derived from G.L. c. 164, § 16.

from the perspective of the overall public interest, and the ability of the company to carry out these obligations with the greatest possible efficiency. Bay State Gas Company, D.P.U. 97-24, at 20 (1997). The Company has not demonstrated that either public policy or lender concerns about the regulatory process warrants a finding of non-applicability of G.L. c. 164, § 14 for either the initial financing or additional amounts that may be sought in the future. Lending institutions engaged in utility financing are aware, or should become aware, of the regulatory environment in which those utilities exist. Moreover, the Department is familiar with project financing arrangements. Massachusetts-American Water Company, D.P.U. 95-118, at 58-79 (1996); New England Electric System/Nantucket Electric Company, D.P.U. 95-67, at 13 (1995); Massachusetts-American Water Company, D.P.U. 95-41, at 2-5 (1995); Harbor Electric Energy Company, D.P.U. 89-220 (1990). Therefore, the Department concludes that G.L. c. 164, § 14 is applicable to the Company.

Notwithstanding our conclusion here, the Department recognizes that the financing statutes contained in G.L. c. 164 were designed to protect both ratepayers and the investing public from the effects of fraudulent stock or bond transactions. Massachusetts-American Water Company, D.P.U. 95-41, at 9. In contrast, capital contributions made to a utility company by its shareholders do not generally involve the issuance of securities or other debt instruments by the utility company. The knowing and voluntary act of Aquaria's members, Bluestone and Inima USA, to infuse equity capital into the Company does not constitute a financial proceeding requiring further approval by the Department under G.L. c. 164, § 14, because these members are not regulated water companies and the capital contribution will not

involve the sale or issuance of securities by Aquaria. See Fitchburg Gas and Electric Light Company, D.T.E. 03-72, at 9 (2003); Massachusetts-American Water Company, D.P.U. 95-41, at 9. Therefore, the Department concludes that capital contributions by Aquaria's members do not require approval under G.L. c. 164, § 14.

Turning to the issuance of debt by Aquaria, the Department recognizes that the financing statutes contained in G.L. c. 164 were designed to protect both ratepayers and the investing public from the effects of fraudulent stock or bond transactions. Massachusetts-American Water Company, D.P.U. 95-41, at 9. The Department has found that when control of a company rests in the hands of an individual or partnership, as would be the case with Aquaria, Department scrutiny of a debt issuance is less critical than in the case where the borrower is a corporation. Dover Water Company, D.P.U. 18365, at 3-4 (1977). Therefore, while the Company would need to obtain Department approval of its debt issuances, the scope of the Department's review will take into consideration the business structure of Aquaria, including the absence of shareholders.

With respect to the Company's request of a finding of inapplicability from the Department regarding G.L. c. 164, § 16, this statute applies when the Department approves an issue of new stock, bonds, or other securities of a gas, electric, or water company pursuant to G.L. c. 164, § 14.[19] The Department cannot disregard the legislative intent of G.L. c. 164,

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[19] General Laws c. 164, § 16 provides, in relevant part, that if Department approves a new security issue and the fair value of the company's plant, land, and fuel inventories are less than its outstanding stock and debt, the Department may prescribe such conditions and requirements as it deems best adapted to make good within a reasonable

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§ 16 to protect both ratepayers and creditors from the effects of utility overcapitalization. See 2B Singer, Sutherland Statutory Construction § 51.02, at 189 (6th ed. 2000). The actual exercise of the provisions of this statute, including the imposition of particular remedies, is left to the discretion of the Department. Nantucket Electric Company/Massachusetts Electric Company, D.T.E. 04-76, at 23 (2004); Boston Edison Company, D.T.E. 00-62, at 10-11 (2000); East Northfield Water Company, D.P.U./D.T.E. 97-36, at 6-7 (1997). Therefore, the provisions of G.L. c. 164, § 16 would also be applicable to the Company.

Finally, G. L. c. 164, § 17 provides civil and criminal penalties for the improper issuance of securities by a director, treasurer, or other officer or agent of a water company.[20] Consistent with our finding above that G.L. c. 164, § 14 applies to Aquaria, the Department concludes that the provisions of G.L. c. 164, § 17 would also be applicable to the Company.

Aquaria has described its financing plans as presently known. As described, the Company's actions do not trigger § 17 review. If the plans materially change, a different conclusion may be warranted.

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[19](…continued)
time the resulting impairment of the company's capital stock.

[20] Although this statute does not specify any grant of special enforcement authority to the Department, we are nonetheless obligated to take appropriate measures in response to violations, including notification to the Attorney General. G.L. c. 164, § 78. Failure to do so would be contrary to the legislative intent of G.L. c. 164, § 17. See 2B Singer, Sutherland Statutory Construction § 51.02, at 189 (6th ed. 2000).

5. G.L. c. 164, §§ 16A and 17A

General Laws c. 164, § 16A authorizes the Department to order a corporation to establish a funded depreciation account, upon a determination that the company has made inadequate provision for depreciation. General Laws c. 164, § 17A requires Department approval of a request by a company subject to this chapter to lend funds, guarantee indebtedness, or invest in the securities of any corporation, association, or trust. Aquaria contends that G.L. c. 164, §§ 16A and 17A do not apply to the Company because it is a limited liability company and not a corporation.

Concerning the application of G.L. c. 164, § 16A, the statute references a "corporation," and Aquaria is not a corporation. As we have stated in § III.B.4, the use of the specific term "corporation," versus the broader "company," confines the application of this specific statute to a particular form of business organization. Therefore, the Department concludes that the provisions of this statute would not apply to the Company.[21]

Regarding G.L. c. 164, § 17A, although Aquaria contends that this statute does not apply to limited liability companies, the statute references "companies," which, under the definition of water companies in G.L. c. 165, § 1, includes limited liability companies. Therefore, the Department concludes that the requirements of G.L. c. 164, § 17A apply to the

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[21] The Department has previously directed a water company operating at that time as a sole proprietorship to establish and maintain a funded depreciation account. Dover Water Company, D.P.U. 18365, at 10 (1976); aff'd Fryer v. Department of Public Utilities, 374 Mass. 685, 692 (1977). However, neither the Department's Order nor the Supreme Judicial Court's decision rely on G.L. c. 164, § 16A as the basis for the decisions therein.

Company.[22] We note that neither Bluestone nor Inima USA are corporations subject to G.L. c. 164 and these entities are able to make such loans or guarantees directly to other companies, subject to other applicable statutes, without Department approval.

6. G.L. c. 164, § 21

General Laws c. 164, § 21 requires the approval of the General Court for any request by a corporation subject to G.L. c. 164 to transfer its franchise, lease its works, or contract with any other person, association or company to carry on its works, unless otherwise expressly provided for in this chapter. Aquaria is not a corporation and does not have a franchise in the cities and towns to which it will provide wholesale service (Exh. DTE 1-5(k)). Therefore, the provisions of this statute do not apply to the Company. See also D.P.U. 90-142, at 8-9.

7. G.L. c. 164, §§ 81-84

General Laws c. 164, §§ 81 through 84 involve certain recordkeeping and reporting requirements.[23] General Laws c. 164, § 81 requires water companies to maintain their books and accounts in a manner prescribed by the Department. Aquaria contends that it should not be required to use the USOA-Water because (1) the Company is engaged exclusively in

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[22] Notwithstanding this conclusion, the Department recognizes that, given the nature of Aquaria's form of business organization and scope of operations, it is unlikely that the Company will ever have occasion to require or seek authority under G.L. c. 164, § 17A.

[23] The Company did not argue G.L. c. 164, § 84 was inapplicable to it until its brief (Exhs. AQ-1; AQ-2; Company Brief at 14). Given that this statute is the penalty provision for failure to comply with G.L. c. 164, § 83, we find that it is necessary to address in this Order.

providing bulk wholesale service to customers, and (2) project lenders "require exemption" from the requirements of this statute (Exh. AQ-2, at 5). The Company states that it intends to develop an accounting system that will meet its requirements (Tr. at 67-68).

The Company must have some form of accounting system to maintain its books and accounts. The Department has long prescribed an accounting system for water companies. 220 C.M.R. §§ 52.00 et seq. The need to ensure accounting uniformity, as well as facilitate the Department's ability to exercise its general supervisory authority over the industries that it regulates, warrants the adoption of a standardized system of accounts for the companies subject to this agency's jurisdiction. See USOA-Water, General Instructions; Reclassification of Accounts of Gas and Electric Companies, D.P.U. 4240-A, Introductory Letter (May 19, 1941). Accordingly, the Department concludes that the requirements of G.L. c. 164, § 81 are applicable to Aquaria.

General Laws c. 164, § 82 requires a water company to keep records pertaining to its manufacture of water at its station, in such form as the Department may require. Aquaria proposes that the maintenance of records kept in compliance with the requirements of federal and state agencies, including USEPA and DEP, be considered to satisfy the requirements of this statute (Exh. DTE 1-7(b)). While G.L. c. 164, § 82 does not prescribe the types of records that must be maintained at Aquaria's facilities, the Company's various permits with federal and state regulatory agencies require, among other conditions, that detailed records be maintained as to the withdrawal and treatment of water, discharge of water back to the Taunton River, and the quality and quantity of water delivered to bulk customers (Tr. at 63-64). This

type of information is consistent with the types of records that are maintained customarily by water treatment facilities, particularly those using desalinization techniques. Accordingly, the Department concludes that the maintenance of records by Aquaria required as part of various permit requirements, including those of USEPA and DEP, would satisfy the requirements of G.L. c. 164, § 82.

General Laws c. 164, § 83 requires water companies to submit an annual return that is a compilation of business, financial and technical information and contained on a form that the companies submit to the Department. While Aquaria does not seek to be exempted from submitting annual reports to the Department, the Company contends that its audited financial statements submitted in accordance with GAAP, supplemented by appropriate technical information, would satisfy the requirements of this statute (Exh. DTE 1-7(a); Tr. at 76). Additionally, the Company desires a ruling from the Department that the information provided in its annual return would not constitute a basis for regulating Aquaria's water rates (Exh. AQ-2, at 6).

Concerning the proposed use of financial statements prepared in accordance with GAAP in lieu of the Department's annual returns, the Department recognizes that GAAP reporting requirements vary from regulatory requirements. See Nantucket Electric Company/Massachusetts Electric Company, D.T.E. 04-74, at 22 (2004); Commonwealth Electric Company, D.T.E. 02-51, at 6 (2002); Boston Edison Company, D.P.U./D.T.E. 97-95, at 76-77 (2001). Therefore, exclusive reliance on GAAP accounting information would provide the Department with an incomplete picture of the Company's

financial operations. Moreover, the Company concedes that financial statements prepared in accordance with GAAP do not provide the same level of information as found in the annual return, particularly with respect to technical plant data (Tr. at 69-75). While Aquaria offers to provide the requisite technical information as an attachment to its proposed GAAP statements, the Company has not demonstrated that the use of the Department's standard reporting form is unduly burdensome. The Company cannot reasonably claim to be burdened by the use of an annual return format that is in use by every other Department-regulated water system in the Commonwealth, including much smaller systems with less technical, financial, and managerial capability than that available to Aquaria. Accordingly, the Department concludes that the provisions of G.L. c. 164, § 83 are applicable to the Company. Consistent with this outcome, and based on the Department's need to enforce its statutory requirements, we conclude that the provisions of G.L. c. 164, § 84 governing penalties for failure to submit annual returns are also applicable to Aquaria.

While Aquaria expresses a concern that the filing of annual returns may result in the Department exercising rate regulation over the Company, the Department considers the Company's concerns misplaced. For many small water systems, the annual return to the Department constitutes the primary source document to support a requested rate increase. Assabet Water Company, D.P.U. 95-92, at 2 (1995); Hutchinson Water Company, D.P.U. 85-194, at 16-17 (1986). However, a utility's annual return also allows the Department to remain knowledgeable about the utility and its operations, in furtherance of its statutory obligation to supervise companies under our jurisdiction. D.P.U. 95-92, at 2 (1995).

See also Annual Returns, D.T.E. 03-76, Vote to Open Investigation (2003); Annual Returns, D.T.E. 02-13, Vote to Open Investigation (2002) (annual returns required of telecommunications providers not subject to rate regulation). Wholesale generating and transmission companies, whose rates are subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC"), submit annual returns to the Department as well. Therefore, we conclude that the Department's annual reporting requirements are not dependent on our exercising rate jurisdiction over a particular entity.

The Department's decision in D.P.U. 90-142, at 10-13, is distinguishable from the facts of this case. D.P.U. 90-142 concerned a wholesale electric generating company subject to regulation by FERC, and the effect of operations on Massachusetts ratepayers were reviewable through the quarterly power cost charge filings by Commonwealth Electric Company as purchaser of the power from the Dartmouth facility. In contrast, there is no federal economic regulation of wholesale water providers, at least those selling exclusively intrastate. Moreover, municipal corporations, such as the City of Brockton, are exempt from Department jurisdiction. G.L. c. 165, § 1. Thus, regulatory oversight of the type formerly achieved through the review of Commonwealth Electric Company's purchased power costs are not available in this case. Therefore, the Department concludes that the requirements of G.L. c. 164, § 83 are applicable to Aquaria. Accordingly, the Department concludes that the requirements of G.L. c. 164, §§ 81-84 are applicable to Aquaria.

8. G.L. c. 164, § 92

General Laws c. 164, § 92, as made applicable to water companies pursuant to G.L. c. 165, § 2, establishes a procedure by which a "person" who is aggrieved at the refusal or neglect of a water company to provide service may appeal to the Department for an order directing the company to provide service upon terms and conditions as are legal and reasonable. Aquaria contends that G.L. c. 164, § 92 does not apply to the Company because it is a bulk, wholesale provider of water to municipalities. As the Company points out on brief, G.L. c. 164, § 92 applies to end-use customers; the term "person" as used in this statute does not include municipalities. In contrast, Aquaria intends to operate as a wholesale water supplier and will not be engaged in a retail water business (Exhs. AQ-2, at 4; AQ-3, at 3; DTE 1-6). Moreover, both the municipality that Aquaria has entered into contract with and those municipalities the Company has identified as potential customers already supply end-users in their respective communities through their own distribution systems (Exh. AQ-3, at 3). Any potential water user seeking retail water service in those communities would request service from their community's water board or similar local authority, and rely on that agency's appeal process as necessary. This application and appeal process does not implicate Aquaria in any way as Aquaria is strictly a wholesale provider and will not sell at retail. Therefore, the Department is persuaded that there is no need for Aquaria to provide retail service to any customer. Accordingly, the Department concludes that the provisions of G.L. c. 164, § 92 would not be applicable to Aquaria, so long as the Company remains

exclusively engaged in the business of producing desalinated water and the sale of such water in bulk to cities and towns in the Commonwealth.

9. G.L. c. 164, § 94

General Laws c. 164, § 94 pertains to the filing and approval of rates and contracts. In relevant part, the statute requires that all contracts for the sale of water be submitted to the Department prior to their effectiveness, and authorizes the Department to investigate the propriety of any such contract at any time. The statute exempts companies whose sole business in the Commonwealth is supplying customers in bulk.

Aquaria's sole purpose is to supply water in bulk to municipal customers; it will not provide service to end-use, retail customers (Exhs. AQ-1, at 4; DTE 2-1; Tr. at 57, 101). Therefore, the Company meets the wholesale exemption requirements of G.L. c. 164, § 94. Moreover, the voluntary wholesale contractual arrangement between the Company and knowledgeable customers well-versed in bulk water supply arrangements obviates any need for the Department, at least on the evidence before us, to exercise any supervision over contracts entered into between Aquaria and its customers. Accordingly, the Department concludes that it is unnecessary to exercise any review of the contracts that may be entered into between the Company and municipal customers, insofar as water sales and services are concerned, provided Aquaria remains exclusively engaged in the business of producing desalinated water and the sale of such water in bulk to cities and towns in the Commonwealth.

10. G.L. c. 164, §§ 96, 99, 101, 102A, and 102B

a. Introduction

General Laws c. 164, §§ 96, 99, 101, 102A, and 102B pertain to the consolidation or merger of water companies. General Laws c. 164, § 96 is also applicable to petitions involving the sale or transfer of property in the form of plant serving a portion of a utility's service area or customer base, even where no merger or consolidation of the petitioning companies was involved. NSTAR Gas Company/Colonial Gas Company, D.T.E. 02-44, at 4-5 (2002); Fitchburg Gas and Electric Light Company/New England Power Company, D.P.U. 18661, at 1-2 (1976); Boston Edison Company/Boston Gas Company, D.P.U. 17444, at 2 (1972).

b. G.L. c. 164, §§ 96, 99, and 101

Although Aquaria contends that G.L. c. 164, §§ 96, 99, and 101 do not apply to limited liability companies and wholesale providers of water, these statutes reference "company" or "companies." Limited liability companies are included in the definition of water companies in G.L. c. 165, § 1. The use of the specific term "company," versus the narrower "corporation," extends the application of this specific statute to a range of business organizations, including limited liability companies.

Moreover, the Department has affirmed repeatedly that G.L. c. 164, § 96 decisions are governed by a public interest standard.[24] Eastern/Colonial Acquisition, D.T.E. 98-128, at 12

[24] The Department interprets a public interest standard as a "no net harm" standard. Eastern-Essex Acquisition, D.T.E. 98-27, at 8 (1998); Nipsco/Bay State Acquisition, (continued…)

(1999); Nipsco/Bay State Acquisition, D.T.E. 98-31, at 9 (1998); Eastern-Essex Acquisition, D.T.E. 98-27, at 8 (1998); Mergers and Acquisitions, D.P.U. 93-167-A at 7-9 (1994). The Department must insure that in the context of G.L. c. 164, § 96 decisions, no net harm results to the public, especially those ratepayers of Department-regulated water systems that may potentially enter into a business combination with Aquaria. Therefore, the Department concludes that G.L. c. 164, §§ 96, 99, and 101 are applicable to the Company.

General Laws c. 164, § 96, however, provides for Department oversight when there is a voluntary merger or acquisition if both the acquiring and purchasing companies are Department-regulated systems. D.T.E. 02-44, at 4-5; Dover Water Company/Dover Water Works, D.T.E. 01-55, at 6 (2003). The acquiring company would have to demonstrate compliance with the capitalization requirements of G.L. c. 164, § 99 as well as the filing requirements of G.L. c. 164, § 101.

Conversely, if there is a voluntary acquisition of assets by an entity not regulated by the Department, such as, in this proceeding, the City of Brockton or an institutional investor, the transaction would not require Department approval. G.L. c. 164, §§ 96, 99 and 101 would also not be applicable to the transaction.

Similarly, if there is an involuntary merger or acquisition, such as may occur in the event of a loan default, the creditor, bankruptcy trustee or trustee in reorganization would manage the business while new ownership arrangements were being negotiated, including

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[24](…continued)
D.T.E. 98-31, at 9 (1998); Eastern Enterprises/Colonial Acquisition, D.T.E. 98-128, at 12 (1999); Mergers and Acquisitions, D.P.U. 93-167-A at 7-9 (1994).

taking possession of and operating the Desalination Plant.[25] Neither the creditor nor trustee would become a regulated entity solely because they exercise mortgagees' remedies, but they would have the same rights and be subject to the same obligations relative to the Desalinization Plant and related facilities as would Aquaria in the absence of foreclosure. Much in the same way that the Department exercised jurisdiction only over the utility operations of those manufacturing companies or proprietorships engaged in the gas or electric business, the Department's jurisdiction would be limited to the Desalination Plant and associated water system. See, e.g., G.L. c. 164, §§ 13, 81, 83; Whitin Machine Works, D.P.U. 9094 (1950).

While the Department concludes that G.L. c. 164, §§ 96, 99, and 101 are applicable to the Company, the extent to which Department jurisdiction would apply would depend upon the specific characteristics of the merger or acquisition.

c. G.L. c. 164, §§ 102A and 102B

Concerning the applicability of G.L. c. 164, §§ 102A and 102B, these statutes pertain to the Secretary of the Commonwealth's documentation requirements and filing fees associated with utility company mergers or consolidations. Consistent with our findings on the applicability of other statutes involving the Secretary of the Commonwealth, the Department concludes that the underlying obligations contained in G.L. c. 164, §§ 102A and 102B are more appropriately addressed in the case of a limited liability company through the Secretary

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[25] In other bankruptcy proceedings involving regulated utilities, the trustee in reorganization operated the bankrupt entity pending acquisition by another utility company. Berkshire Gas Company/Greenfield Gas Light Company, D.P.U. 12479, at 1-3 (1958). This arrangement did not transform the trustee for Greenfield Gas Light Company into a regulated utility.

of the Commonwealth's own regulations applicable to business entities organized under G.L. c. 156C.

11. G.L. c. 164, § 128

General Laws c. 164, § 128, as well as 220 C.M.R. §§ 26.00 et seq., pertains to the creation and administration of customer security deposits. While G.L. c. 164, § 128 is applicable to corporations having franchises in and the use of public streets in communities, Aquaria is not a corporation, but rather a limited liability company. As we have stated in § III.B.4, the use of the specific term "corporation," versus the broader "company," confines the application of this specific statute to a particular form of organization. Therefore, the Department concludes that the provisions of G.L. c 164, § 128 would not apply to the Company.

Concerning 220 C.M.R. §§ 26.00 et seq., this regulation governing security deposits is applicable to "gas, electric, and water utility companies." 220 C.M.R. § 26.01. The use of the specific term "companies" extends the application of 220 C.M.R. §§ 26.00 et seq. to a range of business organizations, including limited liability companies. Therefore, the Department concludes that the provisions of 220 C.M.R. §§ 26.00 et seq. would apply to the Aquaria. Nonetheless, the Company's WSA with Brockton does not specify any security deposit requirement by Brockton, and as such, the Department concludes that the requirements of 220 C.M.R. §§ 26.00 et seq. would not apply at the present time to Aquaria.[26]

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[26] If Aquaria's future water supply contracts make provision for security deposits, the Department expects that the Company will comply fully with the requirements of

(continued…)

C. Proposed Debt Issuance

1. Description of Proposed Financing

In order to finance construction of the Desalination Plant, Aquaria intends initially to issue construction notes payable to its project finance lenders, including Banco Santander Central Hispano SA ("BSCH"), who will also serve as agent for the lenders (Exh. AQ-1, exh. D, Att. B-1). The construction notes will be issued for a fixed term that will correspond with the outside date for the completion of construction that is established under the WSA (Exhs. AQ-1, exh. D, Att. B-1; DTE 2-5).[27] The notes will carry a fixed rate to be determined at the time of issuance based on then-current market conditions (Exh. DTE 2-6).

Once the Desalination Plant is completed, the construction loans will be converted to term notes payable to the respective project lenders on the basis of their percentage interest in their aggregate construction loan commitment (Exh. AQ-1, exh. D, Att. 1, at 2-3, 23-24). The term notes will have an aggregate face value of between $32 million and $36 million, and carry a fixed term of approximately fifteen years (Exhs. AQ-1, exh. D, Att. B-2; AQ-2, exh. C, at 2; DTE 2-5). Based on current and expected market conditions and interest rates, Aquaria anticipates that the term notes will carry an interest rate ranging between 4.6 percent and 8.6 percent (Exh. DTE 2-4).

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[26](…continued)
220 C.M.R. §§ 26.00 et seq.

[27] Based on the current construction schedule, the construction notes would be refinanced with term notes sometime in the spring of 2007 (Tr. at 62).

In order to provide the project lenders with security for the construction and term notes, Aquaria, Inima USA, Bluestone, and BSCH have entered into a number of related agreements. BSCH and Aquaria have entered into a collateral agency agreement with the Bank of New York ("BNY") authorizing the BNY to administer Aquaria's various construction and operating accounts (Exh. AQ-1, exh. D, Att. D-1). Under the terms of a pledge and security agreement, Inima USA and Bluestone will serve as pledgors of the loans to Aquaria, and will in turn subordinate their interests in the Desalination Plant to the project lenders through the BNY (Exhs. AQ-1, exh. D, Att. D-5; DTE 2-7). In turn, the BNY has entered into a financial guarantee insurance policy with Ambanc Assurance Corporation to guarantee the scheduled payments of principal and interest on the loans, as well as a Project Completion Guaranty with Ohl Obrascon Huarte Lain SA, the indirect parent company of Inima USA, to ensure that Aquaria completes the Desalination Plant (Exhs. AQ-1, exh. D, Att. D-2; DTE 2-2). Under the terms of an equity contribution agreement, Bluestone and Inima USA, have agreed to make irrevocable equity capital contributions to Aquaria totaling $12.2 million (Exh. AQ-1, exh. D, Att. D-6).

2. Capitalization

As of June 30, 2004, Aquaria had no plant in service; its assets consisted of $5,733 in cash and construction work in progress ("CWIP") of $119,267 (Exh. DTE 3-3, exh. A (supp.)). On that same date, Aquaria's capitalization consisted of $125,000 in equity contributions from its members (id.).

3. Standard of Review

In order for the Department to approve the issuance of stocks, bonds, coupon notes, or other types of long-term indebtedness[28] by a water company, the Department must determine that the proposed issuance meets two tests. First, the Department must assess whether the proposed issuance is reasonably necessary to accomplish some legitimate purpose in meeting a company's service obligations, pursuant to G.L. c. 164, § 14.[29] Fitchburg Gas & Electric Light Company v. Department of Public Utilities, 395 Mass. 836, 842 (1985) ("Fitchburg II"), citing Fitchburg Gas & Electric Light Company v. Department of Public Utilities, 394 Mass. 671, 678 (1985) ("Fitchburg I"). Second, the Department must determine whether the company has met the net plant test.[30] Colonial Gas Company, D.P.U. 84-96, at 5 (1984); see also Milford Water Company, D.P.U. 91-257, at 4-5 (1992); Edgartown Water Company, D.P.U. 90-274, at 5-7 (1990); Barnstable Water Company, D.P.U. 90-273, at 6-7 (1990).

The Supreme Judicial Court has found that, for the purposes of G.L. c. 164, § 14, "reasonably necessary" means "reasonably necessary for the accomplishment of some purpose having to do with the obligations of the company to the public and its ability to carry out those obligations with the greatest possible efficiency." Fitchburg Gas & Electric Light Company v. Department of Public Utilities, 395 Mass. at 842, citing Lowell Gas Light Company v.

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[28] Long-term refers to periods of more than one year after the date of issuance. G.L. c. 164, § 14.

[29] The provisions of G.L. c. 164, § 14 are applied to water companies pursuant to G.L. c. 165, § 2.

[30] The net plant test is derived from G.L. c. 164, § 16. See footnote 19, above.

Department of Public Utilities, 319 Mass. 46, 52 (1946). In cases where no issue has been raised about the reasonableness of management decisions regarding the requested financing, the Department limits its G.L. c. 164, § 14 review to a determination of reasonableness of the company's proposed use of the proceeds of a stock issuance. Canal Electric Company, et al., D.P.U. 84-152, at 20 (1984); see, e.g., Colonial Gas Company, D.P.U. 90-50, at 6 (1990). Fitchburg Gas & Electric Light Company v. Department of Public Utilities, 395 Mass. at 678, Fitchburg Gas & Electric Light Company v. Department of Public Utilities, 394 Mass. at 842, and Lowell Gas Light Company v. Department of Public Utilities, 319 Mass. at 52 also established that the burden of proving that an issuance is reasonably necessary rests with the company proposing the issuance, and that the Department's authority to review a proposed issuance "is not limited to a 'perfunctory review.'" Fitchburg Gas & Electric Light Company v. Department of Public Utilities, 395 Mass. at 678; Fitchburg Gas & Electric Light Company v. Department of Public Utilities, 394 Mass. at 842, citing Lowell Gas Light Company v. Department of Public Utilities, 319 Mass. at 52.

Regarding the net plant test, a company is required to present evidence showing that its net utility plant (utility plant less accumulated depreciation) is equal to or in excess of its total capitalization. D.T.E. 03-89, at 15-16; D.P.U. 84-96, at 5. The Department's definition of total capitalization is the sum of long-term debt, preferred stock, and common stock outstanding.[31] D.T.E. 03-89, at 15-16; D.P.U. 84-96, at 5. Where issues concerning the

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[31] For purposes of the net plant test, the premium on common stock is treated as common stock. D.T.E. 03-89, at 23.

prudence of the company's capital financing have not been raised or adjudicated in a proceeding, the Department's decision in such a case does not represent a determination that any specific project is economically beneficial to a company or to its customers. In such circumstances, the Department's determination in its Order may not in any way be construed as ruling on the appropriate ratemaking treatment to be accorded any costs associated with the proposed financing. See, e.g., Boston Gas Company, D.P.U. 95-66, at 7 (1995).

4. Analysis and Findings

a. Purpose of Proposed Financing

The Company states that its proposal to execute construction notes and term loans is for the purpose of financing the construction of the Desalination Plant under a project financing arrangement typically used for significant capital projects (Exhs. AQ-1, at 2-3; DTE 2-1). In the past, the Department has found that the expansion or replacement of utility plant is a "legitimate utility purpose" as contemplated by G.L. c. 164, § 14. Nantucket Electric Company/Massachusetts Electric Company, D.T.E. 04-74, at 16-18 (2004); Dover Water Company, D.T.E. 04-50, at 8 (2004); Aquarion Water Company of Massachusetts, D.T.E. 02-57, at 7-8 (2002). Moreover, the Department has recognized the potential benefits associated with a well-structured project financing arrangement in financing utility capital projects. Massachusetts-American Water Company, D.P.U. 95-118, at 76-80 (1996); Massachusetts-American Water Company, D.P.U. 95-41, at 10-11. Based on our review of the credit agreement and associated documents, including the Project Completion Guaranty, the Department concludes that the project financing arrangement described in this Order is

reasonably necessary to accomplish a legitimate purpose in meeting the Company's contractual obligation to provide its customers with a supplemental supply of potable water (Exhs. AQ-1; DTE 2-2).

Aquaria intends to issue construction notes with maturities tied to the completion of the Desalination Plant. Because the current construction schedule would require the debt be converted to term notes in the spring of 2007, at least some of the construction notes to be issued would constitute long-term debt as defined by G.L. c. 164, § 14. See, e.g., Southern Union Company, D.T.E. 01-52, at 9-10 (2001); Colonial Gas Company, D.P.U. 1247-A at 7, n.2 (1982). Customarily, utility plant construction is initially financed with short-term debt or internally generated funds and, once the plant is completed and placed into service, long-term debt is issued and the proceeds used to retire the outstanding short-term debt. However, on occasion, circumstances may arise that render the issuance of long-term debt for construction purposes more cost-effective than the use of short-term financing. Nantucket Electric Company/Massachusetts Electric Company, D.T.E. 04-74, at 17 (2004). In this case, Aquaria has demonstrated that the issuance of construction notes with a maturity date linked to the completion of construction, i.e., greater than one year, will provide the Company with sufficient financial stability to ensure that the Desalination Plant is completed in accordance with the terms of the WPA (Exh. AQ-2, exh. C (confidential)). In consideration of these factors, the Department concludes that the issuance of up to $36 million in long-term debt, in the form of both construction notes and term notes, is reasonably necessary to accomplish a

legitimate purpose in meeting Aquaria's service obligations in accordance with G.L. c. 164, § 14.

b. Net Plant Test

With regard to the net plant test, the Department requires companies to demonstrate that their net utility plant equals or exceeds their total capitalization, thereby supporting the additional amount of financing, pursuant to G.L. c. 164, § 16.[32] Colonial Gas Company, D.P.U. 84-96, at 5 (1984). In the case of distribution companies, the purpose of the net plant test is both to protect ratepayers from excessive rates associated with overcapitalization and to assure the creditors of a utility that the company has sufficient tangible assets to cover its liabilities.[33] Boston Gas Company, D.T.E. 03-40, at 321 (2003); Colonial Gas Company, D.P.U. 1247-A at 7 (1982); Report of the Department of Public Utilities Relative to the Capitalization of Gas and Electric Companies, Senate Document No 315, at 8-15 (January 1922). Under the net plant test, a company must present evidence showing that its net utility plant (utility plant less accumulated depreciation) is equal to or greater than its total

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[32] As noted in IV.B.4, the Department has concluded that the provisions of G.L. c. 164, § 16 are applicable to Aquaria.

[33] The Department recognizes that the first reason, to ensure that ratepayers are not subject to excessive rates, is not applicable in this case because of the Company's negotiated contracts with wholesale-purchase customers. Nonetheless, Aquaria's creditors are still entitled to assurance that the Company has sufficient tangible assets to cover its liabilities.

capitalization (the sum of debt, preferred stock, and common stock outstanding).[34] Colonial Gas Company, D.P.U. 84-96, at 5 (1984).

Aquaria had no net capitalizable plant in service as of June 30, 2004.[35] Consequently, the Company currently has insufficient plant investment to support the proposed financing of between $32 million and $36 million. Nevertheless, G.L. c. 164, § 16 grants the Department considerable discretion in prescribing such conditions as may be deemed best adapted to make good within a reasonable time any impairment of capital stock. See e.g., Boston Edison Company, D.T.E. 00-62, at 10-11; East Northfield Water Company, D.P.U./D.T.E. 97-36, at 6-7 (1997); Colonial Gas Company, D.P.U. 95-76, at 7-8 (1995); Fitchburg Gas and Electric Light Company, D.P.U. 87-195, at 6-8 (1987). The Company has represented that the Desalination Plant will be completed and placed into service in 2007 (Exh. DTE 3-2; Tr. at 62). Once the Desalination Plant is placed into service, Aquaria will have sufficient assets to support its debt, thereby remedying any impairment of the capital investment of its participants.

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[34] Because Aquaria is a limited liability corporation formed under G.L. c. 156C, the Company will not issue capital stock (Exh. DTE 1-5). Nonetheless, the general purpose behind G.L. c. 164, § 16, i.e., to ensure lenders that sufficient assets are in place to cover financial obligations, remains applicable here.

[35] The Department has previously found that CWIP should be excluded from a company's plant accounts for purposes of the net plant test calculation because the term "fair structural value of the plant," as used in G.L. c. 164, § 16, includes only plant that is used and useful in providing utility service to ratepayers. Boston Edison Company, D.T.E. 03-129, at 16 (2004); Southern Union Company, D.T.E. 03-64, at 9 (2003); Colonial Gas Company, D.P.U. 84-96, at 5 (1984).

Having found the proposed financing is reasonably necessary to meet Aquaria's service obligations in accordance with G.L. c. 164, § 14, the Department approves Aquaria's request, provided that the Desalination Plant is placed into service by year-end 2007. The Department concludes that the above condition will allow Aquaria to cure any theoretical impairment of its capital within a reasonable period of time. Nantucket Electric Company/Massachusetts Electric Company, D.T.E. 04-74, at 24 (2004); Housatonic Water Works Company, D.T.E. 96-56, at 8 (1996); Sheffield Water Company, D.P.U. 92-168, at 7 (1992). Our approval here is predicated on the Company's representations that the permitting process is near completion, and that construction will proceed along the timetable provided in this proceeding (Tr. 42-43). If construction is delayed such that the in-service date of the Desalination Plant does not occur as specified, the Company may seek an extension of the year-end 2007 in-service date required by this Order.

Issues concerning the prudence of the Company's capital financing have not been raised in this proceeding, and the Department's decision in this case does not represent a determination that any project is economically beneficial to the Company or its ratepayers. The Department's determination in this Order is not in any way to be construed as a ruling relative to the appropriate ratemaking treatment to be accorded any costs associated with the proposed financing.

IV. ORDER

After due notice, hearing and consideration, the Department hereby rules as follows:

A. That Aquaria LLC is a water company for purposes of G.L. c. 165, § 1;

B. That Aquaria LLC is a Department-regulated utility for purposes of G.L. c. 25, § 3;

C. That the provisions of G.L. c. 164, §§ 4, 5, 6, 8, 8A, 8B, 8C, 8D, 10, 11, 12, 12A, 13, 16A, 18, 19, 21, 23, 24, and 128 are not applicable to Aquaria LLC;

D. That the provisions of G.L. c. 164, §§ 5A are moot insofar as they may be applicable to Aquaria LLC;

E. That the provisions of G.L. c. 164, §§ 92 and 94 are not applicable to Aquaria LLC, so long as Aquaria remains exclusively engaged in the business of producing desalinated water and the sale of such water in bulk to cities and towns in the Commonwealth;

F. That the provisions of 220 C.M.R. §§ 26.00 et seq. are not applicable to Aquaria LLC, so long as contracts for the sale by Aquaria of bulk desalinated water to cities and towns in the Commonwealth do not make provision for security deposits by such cities and towns;

G. That the provisions of G.L. c. 164, §§ 14, 16, 17, 17A, 81, 82, 83, 84, 96, 99, and 101, as well as 220 C.M.R. §§ 52.00 et seq., are applicable to Aquaria LLC;

H. That the enforcement of G.L. c. 164, §§ 4A, 33, 102A and 102B is more appropriately within the purview of the Secretary of the Commonwealth; and

I. That the maintenance by Aquaria of records required as part of various permit requirements satisfies the requirements of G.L. c. 164, § 82.

Further, the Department

VOTES: That the issuance by Aquaria LLC, d/b/a Aquaria Water LLC, from time to time through December 31, 2007 of up to $36,000,000 in long-term debt is reasonably

necessary for a legitimate purpose in meeting the service obligations of Aquaria LLC, d/b/a Aquaria Water LLC, pursuant to G.L. c. 164, § 14; and it is

ORDERED: That Aquaria LLC, d/b/a Aquaria Water LLC, shall be authorized from time to time through December 31, 2007 to enter into a loan or series of loans in an aggregate principal amount not to exceed $36,000,000; and it is

FURTHER ORDERED: That the proceeds from such issuance or issuances shall be used for the purposes as set forth herein; and it is

FURTHER ORDERED: That Aquaria LLC, d/b/a Aquaria Water LLC, comply with all other directives contained in this Order; and it is

FURTHER ORDERED: That the Secretary of the Department shall within three days of the issuance of this Order cause a certified copy of it to be filed with the Secretary of State of the Commonwealth.

By Order of the Department,

/s/

Paul G. Afonso, Chairman

/s/

James Connelly, Commissioner

/s/

W. Robert Keating, Commissioner

/s/

Judith F. Judson, Commissioner

/s/

Brian Paul Golden, Commissioner

Appeal as to matters of law from any final decision, Order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part. Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, Order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of the twenty days after the date of service of said decision, Order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. G.L. c. 25, § 5.